IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.650 OF 2006

Baburav Changu Patil & others Applicants

versus

The State of Maharashtra Respondent

Shri S.V.Gavand for applicants.

Ms.Rajashree Gadhvi, APP for respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 8th March 2006

PC :

1. Heard Shri Gavand for applicants and APP Ms.Gadhvi for respondent.

2. This application has been assigned to me by an order passed by Hon'ble Chief Justice. It was brought to the notice of the Hon'ble Chief Justice that on an earlier occasion I had considered an application for grant of anticipatory bail of these very applicants and by order dated 14th December 2006 passed in Criminal Application No.8089 of 2005 while granting

anticipatory bail to the applicants herein, I had in my order directed that the order of anticipatory bail will enure to the benefit of the applicants only till charge sheet is filed. Thereafter they will be free to apply to the appropriate Court for appropriate reliefs.

3. It appears now charge sheet is filed and therefore, the applicants moved the Magistrate for a protection that the order of this Court should continue for some time so as to enable them to apply for regular bail before Sessions Court. That application was granted by the Magistrate and all that he directed was that this Court's order should continue till further orders.

4. Thereafter, Miscellaneous Application No.137 of 2006 was placed before the learned Sessions Judge and without adverting to the pleas raised therein, the learned Additional Sessions Judge has rejected the same only on the ground that the present applicants are required to be in custody before their application for regular bail can be considered. In other words, for the present application u/s 439 of Cr.P.C. to be maintainable, in view of the learned Additional

Sessions Judge, Raigad, the person accused of the offence, has to be in custody.

5. In my view, all that can be said with regard to the view taken by the learned Additional Sessions Judge is that when this Court has protected the applicants till charge sheet is filed and they were there after free to apply for regular bail, it is not necessary that they should be detained. On the other hand, the said condition is imposed because now a view is taken by the Hon'ble Supreme Court in the case of Sunita Devi Vs. State of Bihar and another reported in AIR-2005-SC-498 that blanket protection cannot be granted or that an order of anticipatory bail cannot remain force for unlimited period. Such an order is untenable in law and according to the Supreme Court is liable to be set aside. At the same time the Hon'ble Supreme Court in this decision in paras 15 to 17 has held as under :-

> "15. The crucial question is when a person is in custody, within the meaning of Section 439 of the Code? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered

himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. The word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law.

16. Since the expression "custody" though used in various provisions of the Code, including Section 439, has not been defined in the Code, it has to be understood in setting in which it is used and the provisions contained in Section 437 which relates to jurisdiction of the Magistrate to release an accused on bail under certain circumstances which can be characterized as "in custody" in a generic sense. The expression "custody" as used in Section 439, must be taken to be a compendious expression referring to the events on the happening of which Magistrate can entertain a bail petition of an accused. Section 437 envisages, inter alia, that the Magistrate may release an accused on bail, if such accused appears before the Magistrate. There cannot be any doubt that such appearance before the Magistrate must be physical appearance and the consequential surrender to the jurisdiction of the Court of the Magistrate.

17. In Black's Law Dictionary by Henry Campbell Black, M.A. (Sixth Edn.) the expression "custody" has been explained in the following manner :-

'... The term is very elastic and may mean actual imprisonment or physical

> detention ... within statute requiring that petitioner be in custody to be entitled to federal habeas corpus relief does not necessarily mean actual physical detention in jail or prison but rather is synonymous with restraint of liberty ... Accordingly, persons on probation or parole or released on bail or on own recognizance have been held to be "in custody" for purposes of habeas corpus proceedings."

6. The Supreme Court has observed that time can be granted to apply for regular bail after surrendering to the custody before the concerned Court which shall deal with the application in accordance with law. The condition imposed by this Court while granting anticipatory bail is of such a nature. Shri Gavand appearing for applicants does not dispute that the applicants will have to surrender to the custody of the concerned Court and that they are willing to do so. In these circumstances, the following order will meet the ends of justice.

7. ORDER :- A) Order dated 6th February 2006 passed by the learned Additional Sessions Judge, Raigad in Criminal Miscellaneous Application No.137 of 2006 is set aside;

B) The said application is restored to the file of Additional Sessions Judge, Raigad for being

dealt with on merits and in accordance with law;

C) The applicants to surrender before the learned Additional Sessions Judge on Monday, 13th March 2006;

D) The Additional Sessions Judge, Raigad is directed to take up the application for disposal on the same day i.e. on 13th March 2006;

E) All contentions as far as merits of the application are concerned, are kept open.

F) Criminal Application stands disposed of.

(S.C.DHARMADHIKARI, J.)